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| APPLICATION NO.                                                                          | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO.         | CONFIRMATION NO.       |
|------------------------------------------------------------------------------------------|-------------|----------------------|-----------------------------|------------------------|
| 10/660,909                                                                               | 09/12/2003  | Wolfgang Kempe       | 12755/3                     | 6383                   |
| 7590<br>Richard M. Rosati, Esq.<br>KENYON & KENYON<br>One Broadway<br>New York, NY 10004 |             |                      |                             |                        |
|                                                                                          |             |                      | EXAMINER<br>CHEN, CATHERYNE |                        |
|                                                                                          |             |                      | ART UNIT<br>1655            | PAPER NUMBER           |
|                                                                                          |             |                      | MAIL DATE<br>03/31/2009     | DELIVERY MODE<br>PAPER |

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/660,909

**Applicant(s)**

KEMPE, WOLFGANG

**Examiner**

CATHERYNE CHEN

**Art Unit**

1655

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 January 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1 and 3-20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 3-20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/CDC)
- Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

The Amendments filed on Jan. 21, 2009 has been received and entered.

Currently, Claims 1, 3-19 are pending. Claims 1, 3-19 are examined on the merits.

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on Jan. 21, 2009 has been entered.

### ***Election/Restrictions***

Applicant's election without traverse of millet see and wax in the reply filed on Sept. 27, 2007 is acknowledged.

### ***Claim Objections***

The numbering of claims is not in accordance with 37 CFR 1.126 which requires the original numbering of the claims to be preserved throughout the prosecution. When claims are canceled, the remaining claims must not be renumbered. When new claims

are presented, they must be numbered consecutively beginning with the number next following the highest numbered claims previously presented (whether entered or not).

Misnumbered claims 16-20 has been renumbered 15-19.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 14, 16-18 are rejected under 35 U.S.C. 102(b) as being anticipated by Hsieh et al. (US 5424085).

Hsieh et al. teaches nuts or seeds are coated with emulsifier (Abstract), lecithin (column 5, line 22) optionally with chocolate (Abstract) as protective coating. It is desirable to apply a coating of edible shellac containing wax (column 7, lines 25-27). Nuts and seeds inherently have a spherical surface.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1, 3-19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hsieh et al. (US 5424085) in view of Belzowski et al. (US 6207207 B1).

Hsieh et al. teaches nuts or seeds are coated with emulsifier (Abstract), lecithin (column 5, line 22) optionally with chocolate (Abstract) as protective coating. It is desirable to apply a coating of edible shellac containing wax (column 7, lines 25-27). Nuts and seeds intrinsically have a spherical surface. Lecithin encompasses phosphatidylserine (see paragraph 2, <http://questhealthlibrary.com/other-supplements/lecithin>). However it does not teach amounts of lecithin, millet, vitamins, minerals.

Belzowski et al. teaches starch based center comprised of a kernel or grain of millet (Claim 2), coated with sugar shell coating (Claim 1). Other additives, such as vitamins, minerals, fats, oils, and preservatives may be included in the starch based center. The starch base center may be fruit pieces, peanuts pieces. The starch center is present in an amount of about 30-100% (Column 2, lines 48-57). It is conventional to

coat edible centers with one or more layers of sugar coating and the sugar shell may contain colorants and flavorants as desired (column 6, lines 21-22, 35-36).

Hsieh et al. teaches nuts or seeds are coated with emulsifier (Abstract), lecithin (column 5, line 22). Belzowski et al. teaches starch based center comprised of a kernel or grain of millet (Claim 2). Millet is a seed. Thus, an artisan of ordinary skill would reasonably expect that millet could be used as the types seeds coated with lecithin taught by the references. This reasonable expectation of success would motivate the artisan to use millet coated with lecithin in the reference composition. Thus, using millet coated with lecithin is considered an obvious modification of the references.

### **Conclusion**

No claim is allowed.

### **Contact Information**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Catheryne Chen whose telephone number is 571-272-9947. The examiner can normally be reached on Monday to Friday, 9-5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terry McKelvey can be reached on 571-272-0775. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Catheryne Chen  
Patent Examiner

/Michael V. Meller/

Primary Examiner, Art Unit 1655